

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**AUDREY R. TACKETT**  
Claimant

VS.

**ABM INDUSTRIES, INC. d/b/a  
AMPCO SYSTEM PARKING**  
Respondent

AND

**INDEMNITY INS. CO. OF NORTH  
AMERICA**  
Insurance Carrier

Docket No. 1,052,155

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the May 9, 2012, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on September 21, 2012. The Director appointed Jeffrey King to serve as Appeals Board Member Pro Tem in place of former Board Member David A. Shufelt. Elaine Fleetwood, of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) averaged the rating opinions of Dr. John Estivo, Dr. Paul Stein, and Dr. Pedro Murati and found that claimant had a 10 percent functional impairment to the whole body.

The Board has considered the record and adopted the stipulations listed in the Award. In addition, during oral argument to the Board, the parties agreed that the exhibits introduced at the preliminary hearing should be considered as part of the record.

### ISSUES

Respondent argues the rating opinions of Drs. Stein and Estivo are more credible than that of Dr. Murati and asks the Board to find that claimant has no functional impairment and that the Award should be limited to temporary total disability benefits and medical treatment provided to date.

Claimant argues the opinion of Dr. Murati is more credible and asks the Board to modify the Award to find that claimant has a 31 percent functional impairment to the body as a whole. Claimant also argues the ALJ should have only considered Dr. Murati's rating opinion because respondent's submission letter and exhibits were not timely filed.

The issues for the Board's review are:

- (1) What is the nature and extent of claimant's permanent partial functional disability?
- (2) Should the testimony from respondent's witnesses and the exhibits offered into evidence during those evidentiary depositions be excluded from the record?

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant began working for respondent in August 2009. For the first two weeks she worked as a cashier/shuttle driver where she would drive only to relieve others for breaks and lunches. After the first two weeks, she started driving a shuttle bus full time. Claimant said respondent has two kinds of shuttle buses. The buses used to transport airport employees are older and have a swing-out arm which opens and closes the doors. The newer buses, used to transport airport customers, have a push button to open and close the doors. Claimant initially drove the older buses and transported airline employees.

In November 2009, claimant started feeling pain in her neck, shoulders and arms. She felt burning in her muscles and started to have tingling and numbness. She also had problems with her lower back, from her shoulder down to her lower back to her waist. The pain would start when she was driving. She reported the symptoms to her supervisor, Pam Ross, who sent her to the manager, David King. Mr. King told her to see her personal doctor.

In January 2010, claimant again discussed her problems with Ms. Ross and Mr. King. Claimant was told to see her personal doctor, and she went to see Dr. Jeanette Miller, who put her on nerve medication, pain medication, a muscle relaxer, a sleeping pill, and migraine medication. Claimant could not drive the shuttle because the medications had side effects of sleepiness and drowsiness. She was taken off work in February and March 2010.

Respondent referred claimant to Dr. Angela Moore. Claimant first saw Dr. Moore on February 9, 2010. She said Dr. Moore treated her with medication and trigger point injections in her neck, shoulder, back and elbows, as well as physical therapy. Dr. Moore released claimant to return to work but restricted the number of hours she could work. When claimant first went back to work, she was restricted to working only four hours a day, and over a period of time she was allowed to increase her hours to eight hours a day. Claimant testified that Dr. Moore restricted her from driving a bus with the swing-out arms and that she provided the restriction to respondent, and respondent accommodated the restriction by allowing her to drive a bus with a push button door opener.

Dr. Moore referred claimant to Dr. Harry Morris in June 2010, who gave her a physical examination, including range of motion testing. Dr. Morris diagnosed claimant with myofascial pain syndrome. He sent her for a nerve conduction study of her bilateral upper extremities, which showed no evidence of cervical radiculopathy or any area of focal compression at the ulnar nerve at the elbows or the median nerve at the wrists. Dr. Morris released her on August 9, 2010, stating, "I think she does not require any specific work restrictions, but the job where she is now as a cashier certainly seems to be acceptable and places minimal stress on her upper extremities."<sup>1</sup>

Claimant continues to work at respondent but as a cashier. She only drives the shuttle bus when the relief cashier calls in sick, and she has not driven the swing-arm shuttle bus since April 2010. She continues to complain of numbness, tingling and burning in the muscles from her neck down into her hands. She still has pain from her neck down to her lower back.

Claimant testified about two previous automobile accidents in which she was involved, one in 2000 and the second in 2006. In the 2000 accident, claimant sustained injuries to her right neck and lower back. She sought chiropractic treatment and said that a few months after she was released from treatment, her symptoms resolved. In the 2006 accident, claimant injured her right shoulder and right neck. She said her symptoms resolved after about six months. Claimant also testified that in 2004 she again sought chiropractic treatment because she was performing heavy physical labor at her job at that time and had some soreness and stiffness.

Dr. Pedro Murati is a certified independent medical examiner. He is board certified in electrodiagnostic medicine and rehabilitation and physical medicine. He evaluated claimant twice at the request of claimant's attorney. Dr. Murati first saw claimant on November 18, 2010. Claimant complained of headaches, pain in her shoulders, pain in her neck and numbness and tingling in both hands. Claimant said she had been injured due to the repetitive nature of driving the old-fashioned buses where she would use her right hand to open and close the door. She had begun to experience pain in her shoulder.

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<sup>1</sup> P.H. Trans., Resp. Ex. 2 at 1.

According to her records, claimant underwent a nerve conduction study/EMG on August 3, 2010, which was read to be normal. An MRI of the right shoulder on August 3, 2010, was read to be negative. An MRI of the left shoulder showed a ganglion cyst at the anterior superior aspect of the left shoulder joint but no rotator cuff tear and no fracture. Claimant was diagnosed by Dr. Miller with cervicgia sprain of unspecified site of shoulder and upper arm. A thoracic MRI done November 11, 2010, was normal. A cervical MRI showed loss of lordosis. Bilateral shoulder MRIs showed tendinosis of the rotator cuff on the right and a meniscal cyst on the left.

Dr. Murati diagnosed claimant with myofascial pain affecting the left shoulder girdle extending into the neck and thoracic paraspinals, and left rotator cuff tear versus strain with labral involvement. He opined that those diagnoses were a result of her work-related injury. Dr. Murati recommended claimant have restrictions of no ladders; no crawling; no heavy grasping, no above shoulder level work with the left; no lifting, carrying, pushing or pulling greater than 20 pounds and that only occasionally, 10 pounds frequently; no work more than 18 inches away from the body on the left; and avoid awkward positions of the neck.

Dr. Murati saw claimant again on August 31, 2011. He said claimant had a lot more complaints the second time he saw her. She complained of headaches; bilateral shoulder pain; neck pain; numbness and tingling in both hands; upper, middle and lower back pain; and bilateral elbow pain that radiated up and down her arms. She had trouble sitting for long periods of time, trouble lifting with both arms, and trouble sleeping. Claimant told him she had been working for two years as a cashier in a booth and occasionally substituted as a shuttle bus driver. Dr. Murati performed an examination of claimant's upper and lower extremities, after which he diagnosed claimant with bilateral carpal tunnel syndrome, myofascial syndrome of the cervical and thoracic paraspinals, and low back pain with signs and symptoms of radiculopathy. He recommended claimant receive chronic pain management. He recommended further testing and physical therapy for claimant's bilateral carpal tunnel syndrome, myofascial syndrome and low back pain.

In case Dr. Murati's recommendations for treatment were not provided or did not work out, he went ahead and gave claimant an impairment rating. Based on the *AMA Guides*,<sup>2</sup> he rated claimant as having a 10 percent rating to her right upper extremity for carpal tunnel syndrome, which converts to a 6 percent impairment to the whole body. He rated claimant as having a 10 percent rating to her left upper extremity for carpal tunnel syndrome. For mild glenohumeral crepitus, claimant received a 6 percent left upper extremity impairment. Her left upper extremity impairments converted to a 15 percent impairment to the whole body. He placed claimant in Cervicothoracic DRE Category II for a 5 percent whole person impairment for myofascial pain syndrome affecting the cervical

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<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

paraspinals. For the myofascial pain syndrome affecting the thoracic paraspinals, he placed claimant in Thoracolumbar DRE Category II for a 5 percent whole person impairment. For the low back pain secondary to radiculopathy, he placed claimant in Lumbosacral DRE Category III for a 10 percent whole person impairments. Claimant's impairments to her whole body combine for a total 31 percent whole person impairment.

Dr. Murati provided claimant with permanent restrictions of no bending, crouching and stooping; no ladders; no crawling; no heavy grasping with either hand; and no above shoulder level work with either hand. Claimant should rarely squat and occasionally sit, climb and descend stairs, and drive. She could occasionally perform repetitive grasping and grabbing. She could frequently stand, walk, repetitively use hand controls, and lift/carry/push/pull to 10 pounds. She should do no work more than 18 inches away from her body with either arm. She should avoid awkward positions of the neck and use wrist splints. She should alternate sitting, standing, and walking and should avoid trunk twist. She should not use hooks or knives. Keyboarding should be done 15 minutes on, 45 minutes off. She should not use vibratory tools with either hand.

Dr. Murati acknowledged he did not diagnose claimant with carpal tunnel syndrome when he saw her in November 2010 but said she had bilateral shoulder pain, which he said was a symptom of carpal tunnel syndrome. Dr. Murati said if claimant's job duties changed from driving a bus and using a lever to open the door to driving a bus with the push button door opener, that would be better ergonomics. He admitted that claimant's initial complaint was that the operation of opening the old-fashioned bus door was the cause of the complaints in her right upper extremity, neck and upper back. He also admitted that claimant did not give him a good explanation of why she developed complaints in her low back. He said that claimant also did not give him a good explanation of her left-sided complaints, but he related her symptoms to overuse syndrome.

Dr. Paul Stein, a board certified neurosurgeon, examined claimant April 4, 2011, at the request of the ALJ. He was asked to determine if claimant was in need of additional medical treatment. Dr. Stein testified that claimant presented with widespread symptomatology. She complained of symptoms in her neck and both shoulders, both upper extremities, and her upper, middle and lower back. Despite her widespread symptoms, Dr. Stein could not find any specific pathology or injury to account for them. A review of a cervical MRI dated February 23, 2010, did not show any significant pathology. An EMG report of August 9, 2010, was negative. His only diagnosis was chronic pain syndrome, which he described as a "waste basket diagnosis for an individual with widely spread pain and no definitive diagnosis."<sup>3</sup> Dr. Stein had no recommendation for any additional investigation or treatment of claimant's physical symptoms.

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<sup>3</sup> Stein Depo., Ex. 2 at 7.

Dr. Stein felt there was some evidence of symptom magnification. He indicated claimant's symptoms were well out of proportion to any objective findings. He found no objective findings to accompany claimant's complaints. He recommended she have psychological testing and evaluation to determine how much psychological or other secondary gain factors might be related to her physical complaints. Dr. Stein said claimant told him she was a bus driver but now was only doing cashier work with occasional driving. She said the buses she uses now have automatic push button doors but that previously some of the buses she drove involved manual doors. Dr. Stein agreed that some of her symptoms would be consistent with the repeated motion of opening the swing arm or bending and twisting her body at a window in a booth, "but the whole constellation of symptoms I think was a bit much."<sup>4</sup> Dr. Stein said that if a person has to repeatedly open and close a manual bus door, she might develop some soft tissue strain in that arm, maybe up into the shoulder and side of the neck. But generally if a person discontinues that work activity, the symptoms will go away.

Dr. Stein noted that claimant had chiropractic treatment from June 2000 into 2006 and massage therapy treatment from 2004 to 2007 for complaints similar to those she expressed to Dr. Stein. He did not believe claimant's current symptoms are related to her previous automobile accidents, but that "we have an individual who has a tendency to sort of blossom an injury into a catastrophe."<sup>5</sup>

Several months after Dr. Stein's evaluation, he received a letter from respondent's attorney asking his opinion regarding permanent functional impairment. Dr. Stein did not see claimant again but generated a response from a review of his report and medical records. Dr. Stein opined that he could not provide a permanent impairment of function for claimant. He stated the *AMA Guides* only provide for impairment for complaints that have an objective finding on examination or testing or an objective diagnosis that explains the symptoms.

Dr. John Estivo, a board certified orthopedic surgeon, examined claimant on December 15, 2011, at the request of respondent. He took a history and reviewed medical records as well as performed a physical examination. Dr. Estivo testified that claimant had a completely normal physical examination. He could not find that she had any abnormalities, although she had a lot of subjective complaints. None of those subjective complaints were objectively affirmed in her physical examination.

At the examination, claimant complained of right and left shoulder pain, numbness and tingling into both her upper extremities down into her hands. She said the numbness

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<sup>4</sup> Stein Depo. at 15.

<sup>5</sup> Stein Depo. at 19.

and tingling would come and go. She claimed cervical spine pain that extended down into both her arms. She said she had lumbar spine pain but denied any leg symptoms.

Dr. Estivo indicated that claimant might have some psychological issues. He did not review any psychological records of claimant but said basically her complaints were vast and he could not find any objective abnormalities when he examined her physically. He stated that is commonly seen with an individual who tends to exaggerate or may have some underlying psychological problems.

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

There is no dispute that claimant was injured. The dispute concerns the permanency of those injuries and whether the injuries constitute a ratable permanent impairment of function. The Board finds they do not. Having reviewed the entire record, the Board finds persuasive the opinions of Dr. Stein concerning the nature and extent of claimant's injury and disability. Dr. Stein testified that claimant does not have an impairment that is ratable under the *AMA Guides*. He considers claimant to have reached maximum medical improvement for the work-related injuries. He did not recommend any permanent restrictions. Although claimant continues to have numerous symptoms, he does not consider those current symptoms to be directly attributable to her work activities with respondent. Accordingly, claimant is entitled to an award for her past medical treatment expenses, together with unauthorized and future medical expenses and the temporary total disability compensation already paid, but claimant has failed to prove she is entitled to permanent partial disability compensation. The ALJ's Award is otherwise affirmed.

Claimant also raised an issue concerning respondent having filed its submission letter to the ALJ out of time. Claimant contends the late submission letter requires that the evidence submitted by respondent be stricken from the record. Presumably this would be the evidentiary deposition of Dr. Estivo taken February 10, 2012, and the evidentiary deposition of Dr. Stein taken February 13, 2012.<sup>6</sup> This issue has been raised for the first time on appeal. There was no objection to or motion to strike respondent's evidence prior to the Award. The ALJ did not address this issue. Generally, the Board only considers

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<sup>6</sup> By order filed December 14, 2011, respondent's terminal date was extended to April 13, 2012.

issues that were first presented to the ALJ.<sup>7</sup> Furthermore, claimant cites no authority for her argument, and the Board knows of none. K.S.A. 2009 Supp. 44-523 provides time limits for the submission of evidence by the parties. There is no allegation that respondent's evidence was late or that the depositions were taken out of time. While a submission letter or brief is permitted, even encouraged, it is not required. The statute even provides that the ALJ should not wait for a submission letter in order to decide the case.<sup>8</sup> The Workers Compensation Act contains no penalties for a late submission letter beyond not considering the arguments in the letter itself. Moreover, the submission letter is a method for listing the evidence and the issues and for making a party's argument on the evidence. The submission letter is not evidence. Claimant's request that the Board strike the respondent's evidence from the record is denied.

Finally, the record does not contain a filed fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, she must file and submit her written contract with claimant to the Director for approval.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated May 9, 2012, is modified to find that claimant is entitled to temporary total disability compensation but is not entitled to permanent partial disability compensation. The Award entered by the ALJ is otherwise affirmed.

**IT IS SO ORDERED.**

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<sup>7</sup> K.S.A. 2009 Supp. 44-555c(a).

<sup>8</sup> K.S.A. 2009 Supp. 44-523(c).



Dated this \_\_\_\_\_ day of October, 2012.

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BOARD MEMBER

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BOARD MEMBER

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John D. Clark, Administrative Law Judge